No. 90-1738

Supreme Court, U.S.
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In the Supreme Court of the United States

October Term, 1990

PACIFIC POWER & LIGHT COMPANY, et al.,
Petitioners,

v.

MONTANA DEPARTMENT OF REVENUE, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE MONTANA SUPREME COURT

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QUESTIONS PRESENTED

May Montana taxing authorities constitutionally impose beneficial-use property taxes on Petitioners, who are alleged users of federally owned high-voltage (500 kilovolts ("kV") and higher) transmission facilities,--

1.--but at the same time exempt private users of state-owned railroad rights-of-way from beneficial-use taxes?

2.--in a manner that imposes higher beneficial-use taxes on Petitioners for the portions of the lines used than they would have paid had they owned such portions outright?

3.--in a manner that erroneously assumes that all power owned by Petitioners flows over taxable federal facilities and that none flows over nontaxable federal facilities, thereby imposing disproportionate and discriminatory taxes on Petitioners?

4.--when Petitioners do not possess, operate, maintain, control, or have physical access to the facilities on account of which such beneficial-use taxes are imposed?

5.--which facilities have the greatest impact upon interstate commerce, but at the same time exempt from taxation those federal transmission facilities that serve primarily intrastate and local interests?

6.--when pursuant to express congressional directive Montana's local taxing districts have already been fully compensated for all impacts occasioned by the construction and operation of the new federal transmission facilities?

PARTIES BELOW AND RULE 28.1 LISTING OF AFFILIATES

Petitioners below were Pacific Power & Light Company ("Pacific Power"),[1] Portland General Electric Company ("PGE"),[2] Puget Sound Power & Light Company ("Puget Sound"),[3] The Washington Water

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[1] Pacific Power & Light Company is an assumed business name for a portion of the electric utility operations of PacifiCorp, an Oregon corporation. The remainder of PacifiCorp's electric utility operations are carried out under the assumed business name of Utah Power & Light Company. Pacific Power is affiliated with the following direct or indirect subsidiaries that are not wholly owned by PacifiCorp: North American Energy Services Company; Eye Dentify, Inc.; Equitec Financial Group, Inc.; Flight Dynamics, Inc.; NERCO, Inc.; Black Swan Gold Mines Ltd.; LeClair Consolidated Mines Co.; Vol Mines, Ltd.; Black Lake Pipe Line Company; Security Offshore Insurance, Ltd.; Pacific Telecom, Inc.; International Satellite, Inc.; Pacific Satellite, Inc.; FTC Communications, Inc.; Pacific Telecom Cable; Gem State Utilities Corporation; ICC Communications Holdings, Inc.; and Northwestern Telephone Systems, Inc.

[2] Portland General Electric Company ("PGE"), an Oregon corporation, is a wholly owned subsidiary of Portland General Corporation ("PGC"), an Oregon corporation. PGE is affiliated with the following direct or indirect subsidiaries that are not wholly owned by PGC: North American Energy Services Company ("NESCO") and Bonneville Pacific Corporation ("B-Pac"). PGC owns the interest in B-Pac and PGE owns the interest in NESCO. PGE has an indirect partnership interest in the following partnerships: Frontier First Partners and Cornerstone Columbia Development Company.

[3] Puget Sound Power & Light Company, a Washington corporation, is affiliated with only two direct or indirect subsidiaries that are not wholly owned: North American Energy Services Company and Hydro West Group, Inc., both of which are Washington corporations.

Power Company ("Water Power"),[4] and the Montana Power Company ("Montana Power").[5] Defendants below, in addition to the Department of Revenue ("Department"), were: Jefferson County; Susan Miller, Treasurer of Jefferson County; Broadwater County; Irene Kemmer, Treasurer of Broadwater County; Powell County; Dalice M. Cook, Treasurer of Powell County; Granite County; Harriet L. Ryan, Treasurer of Granite County; Missoula County; Fern Hart, Treasurer of Missoula County; Sanders County; June M. Thayer, Treasurer of Sanders County; and Ed Argenbright, Superintendent of Public Instruction. All of the defendants were represented by counsel for the Montana Department of Revenue.

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[4] The Washington Water Power Company, a Washington corporation, has a direct subsidiary, Pentzer Corporation, which has three subsidiaries that are not wholly owned: The Limestone Company, Inc.; Itron, Inc.; and North American Services Company. Another Pentzer subsidiary, WP Energy, Inc., owns a one-third interest in a Canadian corporation, NW Energy Corp.

[5] The Montana Power Company, a Montana corporation, has only one indirect subsidiary corporation that is not wholly owned: Intermountain Digital Network, Inc.

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PETITION

Petitioners pe on this Court for a writ of certiorari to the Montana Supreme Court to review the opinion in *Pacific Power & Light Co. v. Montana Dep't of Revenue*, ___ Mont. ___, 804 P.2d 397, *reh'g denied*, ___ P.2d ___ (1991).

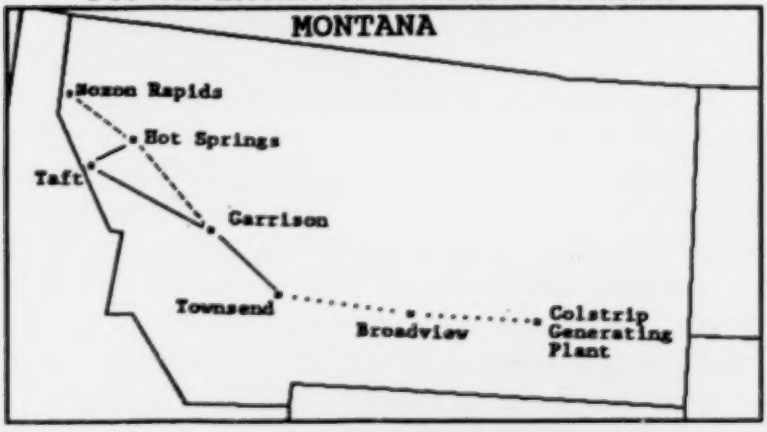
OPINIONS BELOW

The order of the District Court for Lewis and Clark County, Montana, is unreported and is reprinted in the Appendix at A48. The opinion of the Montana Supreme Court is reported at 804 P.2d 397 and is also reprinted at A11. A timely petition for rehearing was filed alleging that the Montana Supreme Court's opinion was based upon two erroneous facts. That petition was also denied; copies of both the petition and the order denying it are reprinted at A21 and A47, respectively.

This litigation is an extension of two prior opinions of the Montana Supreme Court, *Pacific Power & Light Co. v. Montana Dep't of Revenue*, 237 Mont. 77, 773 P.2d 1176 (1989), *cert. denied*, 110 S. Ct. 853 (1990), reprinted at A58 ("*Pacific Power I*"), and *Portland Gen. Elec. Co. v. Montana Dep't of Revenue*, 237 Mont. 324, 773 P.2d 1189 (1989), *cert. denied*, 110 S. Ct. 853 (1990), reprinted at A83 ("*PGE*"). Unlike the opinion that is the subject of this petition, each of those two earlier decisions dealt only with fractions of the overall controversy; specifically, *Pacific Power I* was limited to challenges to the imposition of 1984 beneficial-use taxes on the federal "Montana Intertie," which consists of federal 500-kV transmission facilities from Townsend, Montana, to Garrison, Montana, and

PGE was limited to the imposition of 1985 beneficial-use taxes on the federal Hot Springs-to-Idaho-border 500-kV transmission facilities. Those two prior cases did not address three of the constitutional issues presented here. The locations of the federal facilities are depicted below:

Federal Electric Transmission Facilities



———— = Federal 500-kV Facilities
———— = Federal 230-kV Facilities
. . . . . = Private 500-kV Facilities

JURISDICTION

The opinion of the Montana Supreme Court was issued on January 10, 1991, and the petition for rehearing was denied on February 14, 1991. Under U.S. Supreme Court Rule 20.1 and 28 U.S.C. § 2101(c) (1982), a petition for certiorari is due on May 15, 1991. Jurisdiction rests on 28 U.S.C. § 1257 (1982), as amended by Pub. L. No. 100-352, § 3, 102 Stat. 662 (1988).

STATEMENT OF THE CASE

A. The Facts.

Together for the first time in this petition are all of the significant constitutional challenges to the State of Montana's imposition of state beneficial-use property taxes on congressionally authorized[6] high-voltage electric power transmission lines that are owned, maintained, and operated exclusively by the Bonneville Power Administration ("BPA"), a federal power marketing agency. Specifically, in addition to presenting three significant new questions regarding the constitutionality of Montana's imposition of beneficial-use taxes under the Supremacy Clause[7] and the Commerce Clause,[8] this petition also presents the constitutional challenges the Montana Supreme Court denied in 1989 in *Pacific Power I* and *PGE*.

In 1983 the Montana Legislature amended its beneficial-use tax statute for the purpose of imposing taxes upon private "users" of the federal government's highest voltage electric power transmission facilities in Montana, *i.e.*, facilities of 500 kV or higher. The Montana beneficial-use statute is reprinted at A10. Under the BPA transmission services agreements relied on by the Department to impose the taxes, Petitioners receive and pay for a service from the federal government. They have no right to operate, control,

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[6] Section 4 of the Federal Columbia River Transmission System Act, 16 U.S.C. § 838(b) (1982), reprinted at A5.

[7] Article VI, clause 2, of the U.S. Constitution.

[8] Article I, section 8, clause 3, of the U.S. Constitution.

maintain, or even physically access any of BPA's transmission facilities. In 1987, the State again amended its beneficial-use statute, this time to favor those who contract with the state by *exempting* from beneficial-use taxation private users of *state*-owned railroad rights-of-way. A10.

After the Montana Supreme Court issued its *Pacific Power I* and *PGE* decisions upholding the beneficial-use tax over the Townsend-Garrison and Hot Springs-Idaho border federal transmission facilities (*see* map, *supra* at 2), the Department of Revenue ("Department") changed its methodology for determining beneficial-use taxes on federal transmission facilities. Specifically, in tax year 1986 the Department began employing a method that necessarily inflicts upon Petitioners a higher tax on the portion of the federal facilities used to provide transmission service than Petitioners would have paid had they owned such portion outright. The Department continues to use this discriminatory methodology today.

The completion of the last segment of 500-kV transmission facilities in 1986–the segment from Garrison to Taft (*see* map, *supra* at 2)–also resulted in a separate constitutional challenge.[9] The Department calculated the tax on those facilities by assuming erroneously that all of Petitioners' power transmitted between those points would flow over taxable 500-kV federal facilities and that accordingly none would flow over parallel tax-exempt lower voltage federal facilities.

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[9] The Garrison-Taft facilities were not involved in the prior *Pacific Power I* and *PGE* decisions.

The result of this erroneous assumption was to impose disproportionate and discriminatory taxes on Petitioners.

B. The Proceedings in State District Court.

Complaints raising the constitutional challenges set forth above were filed with the Lewis and Clark County District Court in January 1986 (1985 tax year), in January 1987 (1986 tax year), and in January 1988 (1987 tax year). Upon the filing of the third complaint, the District Court consolidated the proceedings for those three years. Discovery was well underway when, in May 1988, the Department revised its assessments for tax years 1986 and 1987. Because Montana law appears to require that revisions to prior assessments be taken to the State Tax Appeal Board ("STAB") in the first instance,[10] Petitioners sought review of the revisions before STAB and simultaneously moved to stay the District Court proceedings pending the STAB determination. The District Court, however, denied the stay and proceeded to hear the constitutional challenges before the STAB proceedings commenced. During the seven-day trial, the District Court received into evidence depositions and heard the live testimony of expert witnesses related to all constitutional issues; in addition, the court admitted into evidence documents related to all aspects of transmission of power over the federal facilities and the changes in the methodology employed by the Department in calculating beneficial-use taxes on such facilities. At the conclusion of the trial, the District Court issued an

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[10] *See* Mont. Code Ann. § 15-8-601 (1989).

order upholding the taxes in the face of all challenges. A48.

C. The Montana Supreme Court Decision.

As noted above, Petitioners preserved all of their constitutional challenges in their appeal to the Montana Supreme Court. In the instant litigation Petitioners focused particularly upon three constitutional arguments that had not been addressed by the Montana Supreme Court in the prior *Pacific Power I* and *PGE* litigation, *viz.*, (1) that the state's exemption of its own property from beneficial-use taxation violated the prohibition against states' discriminating against the federal government or those with whom it deals;[11] (2) that the Department's new methodology, which has come to be referred to as the "half at the bottom" approach, unconstitutionally discriminated against both the United States and Petitioners; and (3) that the Department's failure to recognize the physical fact that a significant portion of Petitioners' electric power transmitted west of Garrison, Montana, flows over tax-exempt federal transmission facilities resulted in imposing an undue and discriminatory burden on interstate commerce and upon them.[12] The

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[11] *See Phillips Chem. Co. v. Dumas Indep. School Dist.*, 361 U.S. 376 (1960) ("*Phillips*"); *United States v. City of Manassas*, 830 F.2d 530 (4th Cir. 1987), *aff'd*, 485 U.S. 1017 (1988) ("*Manassas*").

[12] When a claim of discrimination is raised, the judiciary must conduct a thorough, searching inquiry into "'the whole tax structure of the state.'" *Washington v. United States*, 460 U.S. 536, 542 (1983) (quoting *Tradesmens Nat. Bank v. Oklahoma Tax Comm'n*, 309 U.S. 560, 568 (1940)). In spite of being informed explicitly of these requirements, the Montana judiciary refused even to consider the two significant new constitutional claims.

Montana Supreme Court entertained only the first of these three new constitutional challenges,[13] erroneously holding that issues (2) and (3) were then before STAB. The Montana Supreme Court held that Petitioners and the exempt users of state-owned railroad rights-of-way were not "similarly situated" under the *Phillips* and *Manassas* decisions because the Montana Supreme Court believed that the exempt users of state property were nonprofit corporations. A17.

Upon receiving the decision of the Montana Supreme Court, Petitioners sought reconsideration in order to correct the two errors, *viz.*, that the private users of state property were nonprofit corporations and that two constitutional issues were before STAB. A21. Addressing the first error, the petition for reconsideration had attached to it a certified copy of articles of incorporation and merger that had been filed with the Montana Secretary of State by one of the exempt users of state-owned railroad rights-of-way, Rarus Railway Company. Those documents establish conclusively that Rarus Railway Company is a for-profit entity. *See* A32.[14] Addressing the second error, Petitioners referred the court to the STAB decision that earlier had been lodged with the court;

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[13] Issue (4), dealing with whether beneficial-use taxes could legitimately be imposed on the Garrison-Taft facilities in tax year 1986, does not raise significant constitutional issues. That question is now before the Lewis and Clark County District Court on an appeal from the State Tax Appeal Board.

[14] The statutory reference in the Certificate of Incorporation to "Section 35-1-203, Montana Code Annotated," A32, is to Montana's for-profit corporation act. *Nonprofit* corporations are governed by Mont. Code Ann. § 35-2-101, *et seq.* (1989).

that decision nowhere addressed or resolved any constitutional issues. *See* A92. On February 14, 1991, the Montana Supreme Court denied reconsideration without comment. A47.

REASONS FOR GRANTING THE WRIT

A. Introduction: Montana Courts' Refusal to Provide Judicial Review.

The Montana judiciary refused to consider two significant constitutional challenges to the state's imposition of beneficial-use taxes on federally owned and operated high-voltage electric transmission facilities,[15] and the Montana Supreme Court denied the third challenge[16] based solely upon its demonstrably false determination of fact.[17] Consequently, this Court is both the last and the *only* forum in which Petitioners can obtain review of the important constitutional claims in these dockets.

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[15] *Viz.*, discrimination resulting from the new "half at the bottom" approach and from the Department's failure to reflect the amount of power flowing over tax-exempt federal facilities west of Garrison.

[16] *Viz.*, the discrimination occasioned by the State's exempting users of state-owned property from beneficial-use taxation.

[17] *Viz.*, that Rarus Railway Company is a nonprofit corporation.

B. The Montana Beneficial-Use Statute Discriminates Against Those Who Contract with the United States.

By exempting users of state-owned railroad rights-of-way from beneficial-use taxes, Montana favored its contractors at the expense of those who contract with the United States. The requirement that states treat federal contractors no worse than they treat their own is implicit in the Supremacy Clause and explicit in decisions of this Court. For example, in *Phillips* the state legislature had authorized imposition of taxes on lessees of federal lands; in that case a state statute, like Mont. Code Ann. § 15-24-1203 (1989), exempted lessees of similar interests in state-owned property. The local school district imposed taxes on plaintiff based on the value of the entire fee, as opposed to the value of only the leasehold. When the lessee of federal property challenged the tax in state court, the tax was upheld. However, this Court reversed unanimously:

> As we had occasion to state, quite recently, it still remains true, as it has from the time of M'Culloch v. Maryland, 4 Wheat. 316, 4 L.Ed. 579, that a state

> tax may not discriminate against the Government or those with whom it deals.

361 U.S. at 387.[18]

Phillips was the decisive case in the Fourth Circuit Court of Appeals' consideration of *Manassas*, which involved a situation closely analogous to the present one. In *Manassas*, property taxes had been imposed pursuant to state statute upon IBM for its "use" of federal property.[19] Because Virginia (like

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[18] A federal district court succinctly stated this proposition as follows:

> Where a taxpayer is singled out and treated differently from all those similarly situated because he transacts business with the United States, as is alleged here, such action discriminates not only against him but also against the United States.

United States v. Dep't of Revenue, 191 F. Supp. 723, 725 (N.D. Ill. 1961).

[19] Because the language of the Virginia exemption of non-federal property is strikingly similar to Montana's own Mont. Code Ann. § 15-24-1203 (1989), the Virginia exemptive language is set forth below:

> Tangible personal property leased, loaned, or otherwise made available to a private party from an agency of federal, state or local government.– . . . This section [imposing beneficial-use taxes] shall not apply to any such property owned by the Virginia Port Authority and leased in connection with the operation of piers and marine terminals and related facilities, or to

(continued...)

Montana) had favored its own subdivisions at the expense of federal facilities, the Fourth Circuit Court of Appeals declared the beneficial-use tax on federal facilities invalid. This Court affirmed that determination. 485 U.S. 1017.

Montana has favored those with whom it contracts by exempting them from beneficial-use taxation. At the same time, it has imposed excessive taxes upon the Petitioners, as is demonstrated in the following portion of this petition. The excessive nature of the taxes Montana imposes is an independent basis for issuing a writ of certiorari.

C. The Montana Tax Imposes Greater Taxes on U.S. Contractors than Are Imposed on Other Taxpayers.

This is the first of two constitutional issues that the trial court and the Montana Supreme Court refused to consider.

After the Montana Supreme Court upheld the beneficial-use taxes in *Pacific Power I* and *PGE*, the Department changed the way it computed those taxes in a manner that necessarily imposes greater burdens on those who contract with the United States. The Department's standard approach to valuing property

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[19](...continued)

> property owned by any transportation district organized under the Transportation District Act of 1964 . . . and leased to provide transportation services.

Va. Code Ann. § 58.1-3502 (*quoted in Manassas*, 830 F.2d at 531).

owned and operated by electric utility companies such as Petitioners is first to derive three indicators of value, *viz.*, the cost indicator, the income indicator, and the stock and debt indicator.[20] The cost indicator is generally represented by the historic, depreciated cost of utility assets used to provide service, the income indicator is derived by capitalizing the utility's income stream, and the stock and debt indicator is derived by determining the market value of the utility's outstanding debt and equity securities. Once these three indicators are known, the Department assigns standardized weights to the indicators; the weights for electric utilities subject to its jurisdiction are 40 percent for the cost indicator, 50 percent for the income indicator, and 10 percent for the stock and debt indicator. For purposes of simplified illustration, assume that each of these indicators has a value of $100 before the impact of federal transmission facilities is considered:

Cost	= $100 x .4= $40
Income	= $100 x .5= $50
Stock and Debt	= $100 x .1= $10
	= $100 Value

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[20] The Montana Department of Revenue uses the "unitary" approach to valuing public utility property. Under this approach, the entire interstate value of property owned and operated by a public utility company operating in Montana is first ascertained, and then the value attributable to Montana is allocated to Montana. Montana's methodology is similar to methodologies used generally throughout the United States for public utility property. For an excellent theoretical overview of the appraisal of public utility property generally, *see* Amdur, *Property Taxation of Regulated Industries*, 40 Tax Lawyer 339 (1987).

If the Department had treated beneficial-use transmission property as property that is owned by Petitioners (*i.e.*, as it did up until 1986), only the cost indicator would have been increased (this is because both the income and the stock and debt indicators inherently reflect all property that contributes to producing income). Assuming that the new federal transmission property has a cost of $60, that amount would have been added to the cost indicator and weighted at 40 percent. The cost indicator would therefore have increased by $24 to a total of $64, and the overall value would have climbed to $124 solely because of the new federal transmission facilities. Again, this is the approach the Department used until 1986 and the approach the Montana Supreme Court approved in the two earlier beneficial-use cases.

In 1986 and in each year thereafter, however, the Department took *half* of the depreciated cost of the federal transmission facilities and added it "at the bottom," *i.e.*, after the three indicators had already been weighted. Taking half of the assumed $60 cost of new federal transmission facilities ($30) and adding it to the already correlated (or weighted) value ($100) results in a total value of $130. This illustrates the discriminatory impact that the new "half at the bottom" methodology has upon Petitioners: For every dollar of taxes Montana would have collected had the federal transmission property been privately owned, it now collects $1.25 from the Petitioners *solely because those transmission facilities are owned by the United States.*[21] Since 1985 Petitioners have paid approximately $19,116,000 in beneficial-use taxes on the

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[21] 30 divided by 24 = 125 percent.

federal transmission facilities.[22] This means that the shift in methodology alone has imposed over $3.5 million in excessive beneficial-use taxes on the Petitioners since the 1986 tax year,[23] and unless invalidated this new methodology in the future will inflict up to $800,000 in unwarranted beneficial-use taxes on petitioners annually.

This manifest and substantial discrimination that the Montana Supreme Court specifically refused even to address violates both the Commerce Clause and the Supremacy Clause.

D. The Montana Tax Discriminates Against Interstate Commerce and Those Who Contract with the United States.

This is the second of two constitutional issues that the trial court and the Montana Supreme Court refused to consider.

As noted above, Supremacy Clause principles preclude states from imposing disproportionate taxes upon those who use federal facilities. *See, e.g., United States v. County of Fresno*, 429 U.S. 452 (1977) (basis for tax imposed must not exceed taxpayer's interest in the value of the federal facilities). In addition, Commerce Clause principles are raised when disproportionate taxes are imposed on federal transmission facilities

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[22] Petitioners now pay annually approximately $4 million in beneficial-use taxes on the federal transmission facilities.

[23] The overpayment percentage under the new approach is 20 percent. 1 divided by 1.25 = .8; 1 minus .8 = .2. $19,116,000 times .2 = $3,823,000.

used to serve out-of-state customers; because the Montana Power Company pays no taxes on the federal 500-kV transmission facilities west of Garrison, Montana,[24] overassessment of the Garrison-Taft federal transmission facilities necessarily discriminates against interstate commerce. The Department overvalued (and today continues to overvalue) the Garrison-Taft facilities by adopting the obviously erroneous assumption that BPA uses exclusively taxable 500-kV facilities to transmit Petitioners' electric power from Garrison to Taft.

Before the Garrison-Taft 500-kV facilities were available for scheduling power in 1986, BPA provided 330 MW of firm transmission demand west of Garrison over tax-exempt 230-kV facilities.[25] The

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[24] The Montana Power Company, which serves customers predominantly located in the State of Montana, takes all power BPA transmits for it over the Montana Intertie into its system at the Garrison substation.

[25] In *PGE*, the Montana Supreme Court provided a comprehensive description of the 330 MW of firm transmission capacity over 230-kV facilities:

> At this point, a brief explanation describing the 330 megawatt limitation is in order. From the Garrison substation to points west, the BPA lacked transmission line capacity to accommodate full transmission of Colstrip power to the Owners' individual system loads. This lack of transmission capacity is due to a gap in the 500 KV lines between the Garrison substation and the Hot Springs substation, referred to in this litigation as the "bottleneck." *Between the two substations, the BPA had only 230 KV lines, which proved insufficient to accommodate the total scheduled Colstrip power.*

(continued...)

Department commenced imposing beneficial-use taxes on the Petitioners on account of the Garrison-Taft 500-kV facilities in tax year 1986. In order to allocate the reserved Garrison-Taft 500-kV capacity to each of the four non-Montana Petitioners, the Department first calculated a fraction; the numerator of that fraction was each utility's maximum transmission demand under its BPA transmission contract.[26] The collective transmission demands of the four utilities totaled 1,269 MW. The denominator of the fraction was 1,915 MW, which the Department used as the capacity of the Garrison-Taft 500-kV facilities.[27] When the

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[25](...continued)

> *Recognizing its inability to fulfill obligations under the Garrison-West Agreements, the BPA imposed a 330 megawatt limitation upon the amount of power which could be scheduled west of the Garrison substation, until the Garrison-Taft 500 KV lines were completed.*

PGE, 773 P.2d at 1191, A86 (emphasis added).

[26] Those percentages are: Pacific Power, 7.31 percent; PGE, 14.10 percent; Puget Sound, 24.33 percent, and Water Power, 20.52 percent. Collectively, the four utilities were charged with 66.27 percent of the total capacity of the Garrison-Taft facilities.

[27] The Department's assumed capacity of the line ignores the bidirectional capability of transmission facilities and the fact that power flow studies presented at trial established that, in fact, power had moved in both directions over the line. In addition, in the course of briefing before the Montana Supreme Court the Department conceded that the actual east-to-west capacity of the Garrison-Taft facilities was 2,000 MW, not 1,915 MW. (At page 57 of its brief, the Department stated that "[I]t is undisputed that the two Garrison to Taft 500 kV lines have a capacity of 2,000 MW.") Had the Department used the correct east-to-west (continued...)

collective transmission demands, 1,269 MW, are divided by the assumed capacity of 1,915 MW, the decimal .6627, or 66.27 percent, is the result. This figure represents the portion of the transmission capacity between Garrison and Taft that the Department allocated to the four non-Montana Petitioners. It is critical to note that the Department utterly failed to recognize the previously existing 330 MW of 230-kV capacity that the Montana Supreme Court referred to in *PGE*. To determine assessable value, the Department then multiplied 66.27 percent times $92,371,397, which it had determined to be the "market value" of the Garrison-Taft facilities.[28] The value of the Garrison-Taft facilities thus assessable to the four Petitioners was thus calculated to be $61,211,124.

The manifest error in the Department's calculations is that the denominator is too small; the necessary result of that error is discriminatory overtaxation. Had the proper denominator been used--one that accounted for the 330 MW of exempt 230-kV transmission facilities the Montana Supreme Court had recognized in *PGE*--the critical percentage would have dropped from 66.27 percent to 56.53 percent.[29] Multiplying this corrected percentage times the total market value of the facilities results in a 1986 value

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[27](...continued)
number (that is, without adjusting its denominator for bidirectional transmission capability), Petitioners' taxes would have declined by approximately 4 percent.

[28] "Market value" was equal to one-half of the total installed cost less depreciation in accordance with the Department's new "half at the bottom" approach, discussed *supra*.

[29] 1,269 MW divided by 2,245 MW = 56.52561 percent.

assessable to the four Petitioners of $52,213,495, which is almost $9 million lower than the value the Department in fact assessed to the four Petitioners. Because the Department has repeated its error in all tax years following 1986, the total overassessments now exceed $40 million. In sum, the Department's calculations clearly discriminate both against those with whom the United States deals *and* against interstate commerce.

E. Other Important Constitutional Issues Raised in *Pacific Power I* and *PGE* Are Also Before the Court.

All of the basic constitutional issues decided by the Montana Supreme Court in *Pacific Power I* and in *PGE* were presented to the Montana judiciary in this litigation and thus are also now before this Court. Petitioners respectfully urge the Court to grant the petition for certiorari in order to review Montana's unprecedented application of the beneficial-use tax concept.

1. Beneficial-Use Taxation in Absence of Possession, Custody, Control, or Access.

Perhaps the most fundamental issue raised in the earlier litigation is whether a state may legitimately impose a beneficial-use tax on purchasers of a service provided by the federal government where the federal government prohibits the party from having any possession, custody, control, or physical access to the facilities subject to the tax. Under their arrangements with BPA, Petitioners turn electric power over to BPA at Townsend, Montana (*see* map, *supra* at 2), and take an equivalent amount of

power, less line losses, from BPA at their various points of delivery. BPA alone schedules, operates, maintains, repairs, and effects replacements to its multistate transmission system which provides this service. Petitioners have access to none of these facilities; therefore, under *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819), and cases consequent thereto, the beneficial-use tax may not be imposed.[30] Because Petitioners lack possession, control, custody, and access to the federal transmission facilities, beneficial-use property taxes may not be imposed upon them.

2. Discrimination Against Interstate Commerce by Restricting Taxes to 500-kV and Higher Facilities.

The record contains extensive and unrefuted evidence to the effect that 500-kV and higher transmission facilities--the highest voltage alternating current transmission lines in the entire Pacific

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[30] *See, e.g., Mayo v. United States*, 319 U.S. 441, 448 (1943) (federal instrumentalities actively employed by U.S. government are exempt from state taxation); *United States v. County of Allegheny*, 322 U.S. 174, 177 (1944) (activities of federal government are not subject to state taxation in absence of congressional consent); *cf. United States v. City of Detroit*, 355 U.S. 466 (1958) (tax may be imposed on one who possesses and uses federal property); *United States v. Township of Muskegon*, 355 U.S. 484 (1958) (tax may be imposed on permittee in actual possession of federal government plant); *City of Detroit v. Murray Corp. of America*, 355 U.S. 489 (1958) (lawful possession of federal property may be basis for imposing tax on one who benefits from such possession); Keesling, *Property Taxation of Leases and Other Limited Interests*, 47 Calif. L. Rev. 470, 487-92 (1959) (property tax can be imposed only if the taxpayer has both possession and use of property subject to tax).

Northwest--serve as arteries of interstate commerce in electric power. The higher the voltage, the greater the impact upon interstate commerce. Montana has singled out these arteries of interstate commerce for taxation while exempting lower-voltage lines that tend to serve more local interests. Montana's intentional imposition of disproportionate burdens on interstate commerce violates the Commerce Clause. *Complete Auto Transit v. Brady*, 430 U.S. 274 (1977).

3. Preemption of Montana's Beneficial-Use Tax on Federal 500-kV Transmission Facilities.

Montana's beneficial-use tax is inconsistent with and thus preempted by two federal statutes. First, Section 7(m) of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839e(m) (1982), reprinted at A7, authorizes BPA to make "impact aid" payments to local governmental units affected by the construction and continued operation of new high-voltage federal transmission facilities. The logic behind the impact-aid provision was to eliminate any possible basis for a claim that new federal transmission facilities in Montana (such as those upon which Montana has imposed taxes in this controversy) would not be paying their way. The respondent taxing districts in this litigation have already received hundreds of thousands of dollars of BPA funds on account of the 500-kV federal transmission facilities; now they seek to impose property taxes upon those facilities as well. Congress obviously did not intend Montana to have both sources of revenue, and therefore Montana's beneficial-use tax on those facilities is preempted by the impact-aid provision.

The second federal statute, Section 2121(a) of the Tax Reform Act of 1976, 15 U.S.C. § 391 (1982) ("Anti-Discrimination Act"), reprinted at A4, also preempts Montana's imposition of beneficial-use taxes. That statute prohibits taxation that discriminates against interstate commerce in electricity, and defines discriminatory taxation as resulting, "either directly or indirectly, in a greater tax burden on electricity which is generated and transmitted in interstate commerce than on electricity which is generated and transmitted in intrastate commerce." In the only decision from this Court applying the Anti-Discrimination Act, *Arizona Pub. Serv. Co. v. Snead*, 441 U.S. 141 (1979), the unanimous Court invalidated a New Mexico tax on the privilege of generating electricity within the state because out-of-state electricity users bore a greater burden than in-state users. By the same token, because Montana's tax on 500-kV facilities itself necessarily discriminates against electricity sold outside of Montana, the tax violates and thus is preempted by the Anti-Discrimination Act.

4. Other Claims.

Petitioners also challenged Montana's imposition of beneficial-use taxes on fourteenth amendment grounds and on implied preemption grounds. The evidence in the record supports these challenges as well. Because these challenges are quite similar to challenges discussed above, they are not discussed in detail in this petition.

CONCLUSION

Petitioners respectfully request that a writ of certiorari be issued and that this Court declare Montana's imposition of beneficial-use taxes on Petitioners unconstitutional under the Commerce Clause, the Supremacy Clause, and the fourteenth amendment to the U.S. Constitution.

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